IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-1874

DAVID L. JONES, SECRETARY OF THE
NORTH CAROLINA DEPARTMENT OF CORRECTIONS,
RALPH EDWARDS, COMMISSIONER OF THE
NORTH CAROLINA DEPARTMENT OF CORRECTIONS,
Appellants,

v.

NORTH CAROLINA PRISONERS' LABOR UNION, INC.,
ON BEHALF OF ITSELF AND ALL ITS MEMBERS,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEE

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OPINION BELOW

The Memorandum Decision of the Three-Judge District Court for the Eastern District of North Carolina is reported at 409 F.Supp. 937 (E.D.N.C. 1976). A copy of the Memorandum Decision is set out in the Jurisdictional Statement (p. 20). Judgment in accordance with the opinion was entered on April 8, 1976. (Jurisdictional Statement 33-34).

JURISDICTION

This action was brought by the North Carolina Prisoners' Labor Union, Inc. on behalf of itself and all its members, seeking injunctive and declaratory relief and monetary damages with jurisdiction based on 42 U.S.C. sec. 1983, and 28 U.S.C. sec. 1343, 2201.

A three-judge district court was convened pursuant to 28 U.S.C. sec. 2281 to 2284 to consider the constitutionality of state-wide regulation issued by the Secretary of the North Carolina Department of Correction on March 26, 1975, forbidding solicitation of membership in inmate unions, negotiations and bargaining between correctional personnel and such unions, and the holding of meetings of such organizations on departmental property. (Jurisdictional Statement 37-38).

Judgment of the district court was filed on April 12, 1976. Notice of appeal by appellants was filed on April 26, 1976. (Jurisdictional Statement 35-36).

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. sec. 1253.

QUESTIONS PRESENTED

1. Does a regulation prohibiting prison inmates from soliciting other inmates to join a prison reform and self help organization violate First and Fourteenth Amendments right of association principles?

2. Does the banning of membership solicitation, meetings and bulk newsletter distribution by a prison reform and self help organization, violate Fourteenth Amendment equal protection principles, when these opportunities are accorded other inmate organizations with similar goals and activities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Fourteenth Amendment.
Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

Regulation of North Carolina Department of Correction, March 26, 1975. Set forth in Jurisdictional Statement 37-38.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

This is an action for declaratory and injunctive relief and monetary damages by the North Carolina Prisoners' Labor Union, Inc. (sometimes referred to hereinafter as the "Union"), against David L. Jones, Secretary of the North Carolina Department of Corrections, and Ralph Edwards, Director of the Division of Prisons of the North Carolina Department of Corrections. Plaintiff claimed that its rights and the rights of its members to engage in speech, press, association and assembly activities protected by the First Amendment were deprived by the defendants, who refused to allow prisoners to solicit others to join the Union, refused to allow meetings of Union members, prevented bulk mailing of newsletters, withheld prisoner mail, and forbade paralegals suspected of Union activity to enter prison facilities, at the same time that the Jaycees and Alcoholics Anonymous are permitted to have chapter organizations, meetings, outside representatives, and bulk mailing privileges.

A three-judge district court was certified to pass upon the constitutionality of a state-wide regulation adopted on March 26, 1975, aimed at suppression of

the Union.

On March 16, 1976, the three-judge district court filed a Memorandum Decision finding the regulation to be unconstitutional and holding that (1) inmates and all other persons shall be permitted to solicit and invite other inmates to join the Union orally or by written or printed communication; (2) the Union shall be accorded the privilege of bulk mailing to the extent that this privilege is accorded other organizations of prisoners; and (3) the Union and its inmate members shall be accorded the privilege of holding meetings under such limitations and control as are applied to other inmate organizations. (Jurisdictional Statement 20, 32). On April 12, 1976, the Court filed a judgment incorporating the provisions of the Memorandum Decision and further providing that free persons otherwise entitled to visit with inmates shall not be denied access to them by reason of association or affiliation with the Union. (Jurisdictional Statement 33-34).

STATEMENT OF FACTS

At the outset it may be pertinent to consider what type of organization the North Carolina Prisoners' Labor Union, Inc., is. Appellants state that the district court was under a "misconception" as to the true nature of the organization,

and that counsel for appellee made a misrepresentation to the court that the Union was a prison reform organization and was not in the business of engaging in collective bargaining. (Appellants' Brief 6-7). The misconception, if any, is derived from appellants' own brief in the district court, wherein it is stated, "Apparently, the Plaintiff is not seeking to establish a national labor relations board type of labor union in the prison system. More accurately, what they want to form is an organized group of elected representatives of inmates within the prison to meet together, and to take their proposals, criticisms, suggestions and the like to the administration." (Defendants' Memorandum in the District Court 2).

True, the Union listed as one of its goals that of collective bargaining for inmates with respect to rates of pay, hours of employment, and other terms and conditions of incarceration. (Brief for Appellants A-1). Both sides of this case are fully aware that this type of collective bargaining would be contrary to a North Carolina statute, N.C.G.S. sec. 95-98, and at no time has appellee or its members taken any active steps to pursue this illusory goal. The thrust of the Union's activities has been that of a prison reform organization.

As stated in its charter, the Union exists to secure meaningful rehabilitation programs, to defend human and civil rights of prisoners, to arrange for community based support groups to appear before legislative bodies in the interests of prison reform, to educate the public through the publication of a union newspaper and through news releases, to retain attorneys for the protection of prisoners' legal rights, and for the advancement of prisoners' economic, political, social, and cultural interests. (Articles of Incorporation 2-3; A. 170-171).

The Union has approximately 2200 members in 40 different prison units throughout the State. The Union is operated under democratic principles with a majority of membership vote determining the actions and policies of the organization. It is a multi-racial organization, and the Board of Directors is composed of seven white persons, six black persons and one American Indian. (A. 170).

In spite of appellants' vigorous efforts to suppress the Union, the evidence is uncontradicted that the Union had attained a measure of racial unity at North Carolina's large Central Prison; that personal responsibility of the membership had been enhanced by their

participation in the democratic processes of the organization; and that the Union helped to build self-reliance among inmates by discussing problems of economic and racial tension, lack of education, lack of employment opportunities and by attempting to find peaceful and crime free alternatives to these problems. (A. 172-173, 166-167).

The March 26, 1975, administrative regulation dealing with the Union, which is the subject of this action, provided (1) inmates are prohibited from soliciting other inmates to join any inmate union, (2) a union may not make any use of Department of Correction property, (3) any person who enters a correctional unit for the purpose of union organizing shall be permanently excluded, and (4) correctional officers are prohibited from negotiating with an inmate union. (Jurisdictional Statement 37-38). Appellants specifically did not undertake to prohibit a union membership, as such, and before the District Court appellant's attorney agreed that they did not seek to interfere with the mere association of the inmates in the Union. (Jurisdictional Statement 22-23, 37).

Following the adoption of this regulation, the Department of Correction prohibited several activities and interfered with certain rights of prisoners

not expressly authorized by the regulation, but with the obvious purpose of eliminating the Union. First, by administrative regulation inmates are entitled to receive incoming mail, as long as it does not contain contraband, material that poses a clear and present danger to security, or material that can not lawfully be mailed. (A. 135-136). The March 26, 1975, regulation banned solicitation of members only by fellow inmates, not by non-prisoners. Nevertheless, numerous pieces of mail from Robbie Purner (a coordinator of Suruban Partner's Prison and Jail Project, who provided a great deal of outside assistance to Union members) addressed to inmates were intercepted by correctional personnel and mailed back to her without explanation, contrary to the standing regulation on mail. (A. 144-146).

Second, another Department of Correction regulation authorizes inmates to receive publications through the mail from publishers, allows inmates to exchange newspapers and other publications, permits publications to be rejected only if they pose a clear and present danger to prison security or are obscene, and establishes procedures for rejections including notice, opportunity to be heard, and impartial decision making. (A. 138-140). The March 26, 1975, regulation does not depart from the general rules about

publications, except to prohibit inmates from soliciting other inmates to join a Union. The Union publishes a bi-monthly newsletter. (A. 171). Contrary to the publication regulation, correctional officers intercepted the Union newsletters, and either returned them to the senders or disposed of them, without following the specified rejection procedures. (A. 143, 151-153, 154).

Third, paralegals were barred from visiting prisoners. Deborah Mailman, one of appellee's attorneys, employed two paralegals, Chuck Eppinette and Robbie Purner, to visit prisoners in connection with legal representation of the Union, as well as in connection with work being done by her as a private attorney for prisoners and as a cooperating attorney of the North Carolina Civil Liberties Union. (A. 157-163, 164). Appellants barred Ms. Mailman's paralegals from the prisons, based on suspicions that these individuals were acting as Union organizers instead of legal assistants. (A. 123-124, 130-133).

Appellants' reasons for seeking to outlaw the Union were that the Union could create a divisive element within the inmate population, inmate organizers could become power figures among the inmates, the Inmate Grievance Commission provides the inmates with a means of airing their

complaints, and work stoppages and mutinies, riots, and chaos could result. (A. 119-123, 127-130). These apprehensions were all of a speculative nature; neither appellants nor their witnesses pointed to any facts derived from the six preceding months of Union activity within the North Carolina correctional system, or to experiences in the prison systems of other jurisdictions, which lent any support to their fears.

Fred G. Morrison, Jr., the Executive Director of the Inmate Grievance Commission, a part of the Department of Correction, stated that he was familiar with the Union and had met with its organizers and officers. He was of the opinion that the Grievance Commission did not amount to a satisfactory alternative for the varied activities of the Union, and that the Union was no threat to the prison system:

> [I]t is my considered opinion that the North Carolina Prisoners' Labor Union, Inc., does not pose a danger to the North Carolina Department of Correction or the orderly administration thereof. I foresee no threat to rehabilitation or other prison programs,

nor do I believe that the prisoners' Union poses any threat to the jurisdiction or operation of the Inmate Grievance Commission. Rather I believe it would be beneficial if the prison administration were less fearful of the prospect of an inmate organization. It is my opinion that constructive change will be more likely to take place if there is cooperation from within the institutions, and this belief is reenforced by my observation of grievance procedures in other states. (A. 180-181).

Inconsistent with their professions that the Inmate Grievance procedure provided an adequate alternative to the Union, appellants recommended that the Inmate Grievance Commission be completely abolished. (A. 181-184).

The testimony of two expert witnesses is included in the record. Both witnesses have extensive experience with inmate reform or self-help organizations in other states, and both testified that such organizations have a positive influence in prisons and do not cause the

ill effects presumed by appellants.

James W. Mullen, Warden of the Rhode Island Adult Correctional Institution, testified that a prisoners' reform association had been operating within his institutions for four years. (A. 14-15). This witness does not regard himself as a reformer or an advocate of massive change; his priorities in order are security, discipline, and rehabilitation. (A. 17, 19-20). Warden Mullen feels that the organization is going in a positive direction, and he has no present desire to disestablish it. (A. 28-29, 46). The warden's meetings with the organization has relieved tension in the institution and created a healthy situation. (A. 77). If the organization did not exist, the warden would be forced to use a system of informers, which is a very dangerous alternative and can result in people getting severely hurt. (A. 38-39). The organization holds meetings in the institution with no prison guards present. (A. 21). The meetings are run by Robert's Rules of Order, and the members are very composed. (A. 25). Some institutional policy changes have arisen from ideas from the organization; one example is the institution's change in visiting room procedure. (A. 27). The Presidents of the organization have served various sentences, varying from life terms to terms of two years (A. 24).

The warden does not negotiate with the organization in the sense of collective bargaining, nor does he feel trapped into a situation where he might have to negotiate in that way. (A. 28). The warden is unable to associate the activities of the organization in any way with such things as violence, riots, or attempted riots. (A. 24). There is no evidence that the organization has caused work stoppages or strikes. (A. 48-50). The warden has received support and cooperation from the officers, directors and other leadership of the organization during times of tension or difficulty. (A. 52) There is a formal grievance procedure at the institution; however, the organization's concerns are broader than the grievance procedure encompasses. (A. 53). The organization publishes a monthly newsletter, and these are distributed in bulk within the institution. (A. 32-33).

The witness Paul W. Keve is Director of Adult Corrections for the State of Deleware. He conducted a study of inmate organizations at San Quentin Prison to see what effect the organization would have on prison management. His study showed that troubles at the institution did not stem from the inmate organization; that when a handfull of militant inmates attempted to take control of the organization, they failed and the other inmates proved capable of stabilizing the situation; and he

concluded that the problem of destructive convict bosses is directly attributable to weak, inexpert prison management, not to inmate organization activites. (A. 82-85). Mr. Keve believes that if an inmate organization provides an electoral structure and for democratic participation, it serves a rehabilitative purpose. (A. 93). This witness has concluded that prisoner unions are eventually coming to all systems, and correctional administrators should accomodate themselves to these organizations. (A. 92). An inmate organization has existed in the Delaware Corrections System for three years. This organization has in no way endangered the security of the system, and there have been times when it helped materially to stabilize the situation. (A. 95).

Appellants have allowed two inmate organizations to operate within the prison system, the Junior Chamber of Commerce and Alcoholics Anonymous. These groups are accorded a wide range of privileges, including meetings in spaces provided by the Department, newsletters published in prison facilities and distributed in bulk to inmates, outside organizers permitted to visit prisoners, and a variety of other activities, none of which are afforded the appellee Union. (A. 125-126, 174-175). Other groups of inmates allowed to hold meetings and have other privileges include Women's Club, Yokefellows, Boy Scouts, Weightwatchers, and China Art Club.

The District Court made the following findings:

> (1) The appellants fear the possibility of concerted group action but are not gravely concerned with mere association of inmates in the Union. (Jurisdictional Statement 22).
>
> (2) Inmates are permitted to join a Union and have been and are being permitted to join the North Carolina Prisoners' Labor Union, Inc. (Jurisdictional Statement 24).
>
> (3) There have been a number of recent incidents amounting to a denial of the Sixth Amendment right of a prisoner to legal representation. Most of the incidents have involved the utilization of paralegals and the suspicion of some prison administrators that the paralegals were engaged in soliciting membership rather than in the implementation of this lawsuit or other court proceedings. (Jurisdictional Statement 24-25).
>
> (4) There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions. (Jurisdictional Statement 28).

(5) There is no evidence tending to show that the inmates intend to operate the Union to hamper and interfere with the proper interests of government. (Jurisdictional Statement 28).

(6) The record is bare of any suggestion of concerted activity, although the Union is said to have been active for many months and to number some 2,000 members. (Jurisdictional Statement 28).

SUMMARY OF THE ARGUMENT

I. The Regulation Prohibiting Inmates From Soliciting Other Inmates to Join the North Carolina Prisoners' Labor Union Violates First and Fourteenth Amendments Right of Association Principles.

A. The State Failed to Carry its Burden of Proving a Substantial Correctional Interest to Overcome the Prisoners' Constitutional Rights.

Appellants have not challenged the existence of North Carolina Prisoners' Labor Union, nor the rights of inmates to organize and join it. They have sought to prohibit prisoners from soliciting others to join the Union.

In order to justify this restriction of prisoners' First Amendment associational rights, the burden is upon the state to prove a sufficiently strong legitimate interest in security, order or rehabilitation unrelated to the suppression of expression. The state must show some basis in fact or experience for this justification.

The District Court made findings of fact fully supported by the evidence that the Union had not been utilized to disrupt

the operation of the penal institutions, and that there was no intention to operate the Union to hamper and interfere with proper interests of government. Thus, the state failed to demonstrate any basis for its hypothesis that the security interest or any other substantial penological concern would be threatened by the Union.

The prohibition or solicitation is a greater restriction on First Amendment rights than is necessary, and the state must adopt less restrictive measures aimed more precisely at the militancy or disruption that it wishes to avoid.

B. Adequate Alternatives to the Union by Which the Prisoners Can Advance Their Legitimate Goals Are Not Available

The question of adequacy of alternative means of pursuing the associational goals does not arise in this case, because the state has demonstrated no legitimate reason for restricting the inmates' rights.

Even if alternatives to the Union are to be considered, it must be concluded that none of them are adequate substitutes. Individual efforts at improving the lot of prisoners can never be as effective as group advocacy. The inmate grievance procedure is not a viable alternative, since its scope is much narrower than that of the Union, and appellants themselves have

attempted to abolish it. The legal resources of the Union are of great value to prisoners, who would otherwise be limited in their ability to have meaningful access to the courts. Convicted felons are deprived of the right to vote, and thus are unable to affect directly the decisions of government; the Union provides them a vehible for gaining an outside support group with political power.

II. The Banning of Union Membership Solicitation, meetings and Bulk Newsletter Distribution Violates Fourteenth Amendment Equal Protection Principles.

A. The Prisoners' Labor Union Members are Entitled to be Treated Equally with Members of Other Inmate Organizations.

Prisoners are entitled to equal protection of the laws with respect to fundamental rights, including the associational rights at issue here.

The Jaycees and Alcoholics Anonymous are granted the opportunities to solicit members, hold meetings, and distribute their newsletters in bulk. The aims and activities of these organizations are closely similar to those of the Union. There is

no evidence to support appellants' suspicions that the Union's activities will be detrimental to the state interests of security, order or rehabilitation. In the absence of such evidence the state has a constitutional duty to grant the Union the same opportunities for membership solicitation, meetings, and publication distribution that it does to the other organizations.

B. The Equal Treatment Mandated by the District Court was an Appropriate Prophylactic Measure to Prevent Rampant Violation of the Prisoners' Correspondence, Reading and Judicial Access Rights.

Appellants opened incoming mail to Union members and returned it without explanation, seized and either disposed of or returned Union newsletters without any procedures, and permanently banned paralegals working on Union legal matters, all as part of their campaign to suppress the Union.

Each of these acts was in patent violation of this Court's decision in Procunier v. Martinez, 416 U.S. 396 (1974). The District Court's order requiring that the Union be treated equally with other inmate organizations had the salutory effect of bringing these unconstitutional practices to a halt.

ARGUMENT

I. THE REGULATION PROHIBITING INMATES FROM SOLICITING OTHER INMATES TO JOIN THE NORTH CAROLINA PRISONERS' LABOR UNION VIOLATES FIRST AND FOURTEENTH AMENDMENTS RIGHT OF ASSOCIATION PRINCIPLES.

Although "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," Price v. Johnston, 334 U.S. 266, 285 (1948), it is now settled that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). The North Carolina Prisoners' Labor Union, as an organization dedicated to the goals of effecting prison reform and promoting understanding of the problems of offenders and ex-offenders, seeks to exercise rights guaranteed by the First and Fourteenth Amendments: the right to associate to vindicate shared political and social goals, see Healy v. James, 408 U.S. 169 (1972); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois St. Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 375 U.S. 449 (1958), and the right to petition all three branches of both state and federal governments for the redress of grievances,

see Pell, supra at 828 n. 6; Procunier v. Martinez, 416 U.S. 396, 419 (1974); Healy, supra at 181; Johnson v. Avery, 393 U.S. 483 (1969); Ex Parte Hull, 312 U.S. 546 (1961).

A. The state failed to carry its burden of proving a substantial correctional interest to overcome the prisoners' constitutional rights.

The question presented in this appeal concerns the constitutionality of specific regulations promulgated by the North Carolina Department of Correction, inter alia prohibiting inmates from soliciting other inmates to join the Union by any means, either oral or written.[1] Appellant

[1] The pertinent portion of the regulation in question provides: "Persons in the custody of the Department of Correction are prohibited from soliciting other inmates about membership in any inmate union. If the Officer in charge has reason to believe that correspondence between inmates concerns organization of an inmate union in violation of this rule, then the correspondence may be censored and if necessary delivery may be withheld. An inmate accused of soliciting shall be subject to discipline for agitating and failing to obey a lawful order. The unit superintendent or his designated representative shall proceed against the inmate accused in accordance with established Departmental procedures." (Jurisdictional Statement 38).

has not attempted, either by departmental regulation or by its position in the court below, to challenge the existence of the appellee Union or the right of inmates to join the Union. On finding that the Department of Correction permitted inmates to join the Union, the District Court properly declined to consider the question of whether inmates have a First and Fourteenth Amendment right to organize and join the Union. Jurisdictional Statement 22-23; 409 F.Supp. at 940-41.[2] Therefore, it is

[2] Courts which have considered this question have held that inmates do have a right to associate and to engage counsel to vindicate their legal rights, see Butler v. Preiser, 380 F.Supp. 612, 620 (S.D.N.Y.); National Prisoners' Reform Ass'n v. Sharkey, 347 F.Supp. 1234, 1237-38 (D.R.I. 1972); cf. Goodwin v. Oswald, 462 F.2d 1237, 1245-48 (2d Cir. 1972) (Oakes, J., concurring); Fortune Society v. McGinnis, 319 F.Supp. 901 (S.D.N.Y. 1970). The right of inmates to form and join such associations if the associations seek to accomplish their goals only by peaceful means was also recognized in Paka v. Manson, 387 F.Supp. 111, 123 n. 19 (D. Conn. 1974).

not necessary for this Court to decide whether inmates have a constitutional right to organize or to join a prisoners' union.[3]

In Pell v. Procunier, supra, this Court established a framework for analyzing the validity of state regulations which are asserted to inhibit prison inmates' exercise of rights within the ambit of the First and Fourteenth Amendments. First, it is evident here, as it was in Pell, that the challenged regulation does restrain inmates' freedom of communication. See id. at 823. Inmates who converse or correspond with each other may be punished under the regulation if they express their beliefs on a subject of common interest - the formation and activities of the Union. As the District Court stated, under Pell, supra, prisoners are permitted to "talk about any subject of interest to them that does not conflict with legitimate penological objectives of the institution," Jurisdictional Statement 27; 409 F.Supp. at 943; accord, Fortune Society v. McGinnis, supra at 905. Because the challenged regulation obviously curtails expression, the restriction must be analyzed "in terms of

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[3] Appellant's attempt to shift its position in this Court and its invitation to the Court to decide questions not raised below should be rejected. See page 31 infra.

the legitimate policies and goals of the correction system." Pell, supra at 822.

Although, as appellants note, prison officials are afforded a degree of latitude in resolving matters of internal prison administration, Martinez, supra at 414, this latitude is not total. The decisions of this Court in Pell, supra, and Martinez, supra, demonstrate some of the boundaries placed on the deference accorded prison administrators, limitations derived from traditional First Amendment analysis. First, the state may not "offend a fundamental constitutional guarantee." Martinez, supra at 405. Second, the interest the state asserts to justify a restriction of inmates' rights must be a legitimate interest in security, order or rehabilitation, unrelated to the suppression of expression. See Pell, supra at 826-28; Martinez, supra at 411, 413, 415. Finally, it is not sufficient for the state merely to invoke its legitimate interest in security. The state has some burden to demonstrate a reasonable connection between the interest cited and the activity or expression being prohibited. For example, in Martinez, supra, the state asserted that censorship of inmates' mail to excise inflammatory racial or political comments was justified "as a precaution against flash riots and in the furtherance of inmate rehabilitation." Id. at 416. Although not doubting that the state has a legitimate interest in preventing flash riots, this Court rejected the tendered justification because

the state had not demonstrated any persuasive connection between such expression and the asserted consequences. Id. Similarly, although rehabilitation is certainly a legitimate state goal, the Court found that the state had failed to show any logical connection between censorship and inmate rehabilitation. Id. Thus, while the state is not required to prove with certainty that the adverse consequences they allegedly fear will flow from the prohibited activity, Martinez, supra, at 414, the lesson of Martinez is that the state must be able to show some basis in fact or experience for their fears. Compare Healy, supra at 186. Even in the peculiarly restricted environments of schools and prisons, "undifferentiated fear is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Community School Dist., 393 U.S. 503, 508 (1969).

Under Pell and Martinez, the court below therefore was required to weigh the evidence to determine first, whether the state had any legitimate interest in the challenged restriction and, second, whether the evidence showed a reasonable connection between the state's asserted interest and the prohibited activity. Appellants attempted to justify the challenged regulation by asserting that the Union might jeopardize the security of the North Carolina prisons, raising the

spectre of disappointed inmates becoming militant and disruptive if their demands were not met. On examining the proferred expert testimony and evidence about the North Carolina Prisoners' Union, the court found "not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions," and no evidence "tending to show that the inmates intend to operate [the Union] to hamper and interfere with the proper interests of government." Jurisdictional Statement 28; 409 F.Supp. at 944. In addition to considering the history of the North Carolina Prisoners' Labor Union in the context of the North Carolina prisons, the court also reviewed testimony of prison administrators from other jurisdictions and declined to find on the basis of this testimony that a prisoners' union was likely to pose any danger whatever to prison security. Jurisdictional Statement 26-27; 409 F. Supp. at 943. Thus, although the interest in prison security cited by appellants is a legitimate interest, the court found that appellants had failed to demonstrate any basis in fact or experience for the hypothesis that this interest would be jeopardized if prisoners were allowed to discuss the Union and invite other inmates to join it.

In accordance with this determination that the state had, in effect, "exaggerated its responses," see Pell, supra, at 827, the court concluded that inmates' expressions of belief about the Union, or invitations to join the Union, would not threaten the security of the prison, and that there was no substantial governmental interest in suppressing such expression. Jurisdictional Statement 27; 409 F.Supp. at 943. On balance, therefore, the court concluded that the regulation banning solicitation was invalid.

Review of the record and of the opinion testimony reiterated in appellants' brief in this Court shows that the District Court's findings were fully supported by the evidence and, therefore, not clearly erroneous. Although the Union has 2200 members, there was not one incident cited tending to show that the Union or any individual member of the Union has been or is likely to be disruptive or militant,[4] or that any member is likely to

[4] Compare Paka v. Manson, 387 F.Supp. 111 (D. Conn. 1974), where the court found that Connecticut had presented substantial evidence to show that a prisoners' organization at one institution and the plaintiff inmates representing that organization had been attempting to exacerbate racial tensions at the institution, and to polarize inmates and administration. In light of

arrogate excessive power to himself. Compare Paka, supra.

It is not surprising that the District Court was unimpressed by the state's attempts at self-justification. The speculative fears expressed below and repeated in appellants' brief in this Court appear to be based in large part on a misapprehension or misrepresentation of the nature of the appellee Union.[5]

4 (cont.) documented incidents of disruption, the court found that the state's fear of this particular organization was not exaggerated, id. at 121, and that the propensity for violence shown by plaintiff distinguished their organization from non-disruptive inmate groups protected by the courts in Sharkey, supra, and Butler, supra. See 387 F.Supp. at 123 n. 19.

[5] It should also be noted that the speculative fears the state has expressed are intended to support its novel claim, raised for the first time in this Court, that the state has no obligation to "recognize" the Union or to allow the Union to exist. None of the allegations purporting to show that the Union is "bad," see Jurisdictional Statement 25-27; 409 F. Supp. at 942-43, present any justification whatever for the specific regulation

The state asserts that the Union "would create friction between inmates and staff," and that an organization with no bargaining power would be likely to resort to strikes and riots if officials refuse to deal with inmates. Appellants' Brief 9-10. According to the unrebutted testimony, the Union seeks to resolve disputes by peaceful means, and seeks to utilize channels outside the prison, such as community groups, the legislature and the courts, to accomplish goals, many of which have little or nothing to do with internal prison administration. See A. 169-175.[6]

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[5] (cont.) banning solicitation. As the District Court found, it is irrational to permit inmates to join a group and then to prohibit them from inviting other inmates to join that same group. Id. at 27-28; 409 F.Supp. at 943. The state cannot, at this late date, avoid the inconsistency of this position by questioning whether they were required to grant permission for inmates to join the Union.

[6] Compare Paka, supra, where the plaintiff organization's only stated goal was to negotiate inmate grievances with the prison administration.

The asserted fear that particular inmates will exert undue control over other inmates is unsupported by any evidence about particular inmates, or by any evidence substantiating the theory that such an organization would create power figures.[7] The conseqences the state envisions seem to be

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[7] The interest of correctional administrators in preventing prisoners from gaining disproportionate notoriety and influence among their fellow inmates was regarded as sufficient to overcome First Amendment interests involved in press interviews with designated prisoners in Saxbe v. Washington Post Co., 417 U.S. 843 (1974). Recently, however, the Bureau of Prisons has voluntarily withdrawn the regulation there upheld, not because of any constitutional deficiency, but simply because it isn't useful. Federal Prison System Policy Statement on Contacts with News Media, No. 1220.1C (Jan. 17, 1977). The lesson to be learned from this experience is that state interests which are asserted to be powerful enough to overcome First Amendment rights must not be uncritically accepted, but must be scrutinized with some degree of skepticism. Searching for some scrap of evidence that inmate organizations will breed power brokers, appellants refer to the suppression of young convict leadership by some of the oldtimers at the Rhode Island Adult Correctional Institution.

grounded, for the most part, in the state's erroneous assumption that the Union intends to operate as a collective bargaining unit, and to engage in concerted action to force their demands upon the prison administration. This is precisely what the Union does not intend to do. As the District Court found, under North Carolina law, collective bargaining between any union and a state agency is prohibited, N.C. Gen. Stat. §95-98. The District Court has already held that inmates "have no right to form or belong to a labor union for the purpose of taking concerted action to force their demands upon prison administrators," or to resist prison discipline. Jurisdictional Statement 30; 409 F.Supp. at 945.[8] Appellee Union has no disagreement with this

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[7] (Cont.) Appellants' Brief 16, n. 8. What appellants fail to mention is that Warden Mullen was unable to identify the Reform Association or its leadership in any way with these events, and that he regarded the association as being positive and useful. (A. 29, 38-39, 75, 77).

[8] The District Court also found irrelevant that the Union originally hoped to operate as a bargaining unit, and that the Charter of Incorporation lists bargaining as one of the Union's purposes. Jurisdictional Statement 21 n. 1; 409 F. Supp. at 940 n. 1.

principle, and thus presents no cause for the alarm expressed by the state. As the District Court found, there is absolutely no reason to anticipate that the Union has the intention to take concerted action attributed to them by appellants. Jurisdictional Statement at 28; 409 F.Supp. at 944.

If the Union were to bely its own goals by becoming militant or disruptive, the state would then have a basis for stopping further solicitation, and for curtailing Union activities to whatever extent necessary. Where as here, First Amendment rights are involved, the state must adopt the least restrictive alternative means of furthering its legitimate interests. Shelton v. Tucker, 364 U.S. 479, 488 (1960). This requirement applies in prison as well as outside, for as the Court said in Martinez, 416 U.S. at 413, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the particular government interest involved." Appellants' regulation banning solicitation of members by the Union, therefore, sweeps too broadly. The state is permitted under the First Amendment only to prohibit imagined activities of the Union, e.g. strikes, work stoppage, which would have some potential for injuring security, discipline, and other interests

legitimately claimed by appellants, unless it could be demonstrated that the mere solicitation of members bears a threat of such harm, and that of course the appellants have failed to do.[9]

Since the state has presented no demonstrable basis for its fear of the Union, and in fact has permitted inmates to join the Union, there is no legitimate justification for a total ban on solicitation of other inmates. It is apparent that the state's only interest in the content of inmates' conversations or correspondence about the Union is a bald desire to suppress expression which it finds unwelcome, but cannot demonstrate to be dangerous, an interest which is clearly impermissible. See Martinez, supra

[9] The District Court's holding, allowing prison officials to further their asserted goal of preventing militant coercive action by prohibiting only militant activity and not all Union activities, is consistent with these principles. Equally consistent is the court's observation that if inmates ever threaten concerted action to force compliance with their demands or to disrupt discipline, not only union solicitation may be stopped, but also the Union can be put down to whatever extent necessary. Jurisdictional Statement 28-29.

at 413. Because the state's only interest in enforcing the regulation on solicitation is not unrelated to the suppression of expression, it is respectfully submitted that the District Court did not err in finding that inmates must be allowed some means of inviting other inmates to join the Union.[10]

B. Adequate alternatives to the Union by which the prisoners can advance their legitimate goals are not available.

Appellants also suggest that the District Court should have held that inmates in the North Carolina prisons have no right to associate to petition for redress of grievances because they have

[10] In so finding, the District Court recognized the state's right to regulate the "time, place and manner" of communications among inmates, see Pell, supra at 826; Jurisdictional Statement 30; 409 F.Supp. at 945. The appellee Union does not assert a right to solicit by any particular means; they only claim the right to some form of communication about membership in the Union, at least in contexts where inmates are already permitted to speak or correspond with one another, and the right not to be punished for discussing the Union's lawful activities.

a means of communicating their grievances to the prison administration through the inmate grievance procedure. Appellant's Brief 23-25. This argument is based on the fact that this Court, in Pell, supra at 823-26, found that so long as reasonable and effective means of communication between inmates and the press were available, the state could legitimately ban face-to-face interviews between individual inmates and represenatives of the press. However, the Court made this finding in light of its recognition that allowing unrestricted access to prisons by the press would entail obvious problems of security and administration. Id. at 825. The question of whether or not alternative methods of communication exist only becomes relevant where the state has demonstrated that it does have a legitimate and well-founded reason for imposing a restriction on the form of communication inmates choose. Where a demonstrated legitimate state interest must be weighed against an inmate's desire for unrestricted freedom of communication, the question of whether effective alternative means of communication exist is a factor that should enter into the balance. Thus, in Pell, the Court found that the state's legitimate and demonstrable interests outweighed the inmate's interest in the desired form of communication in the light of available and effective alternatives.

In Johnson v. Avery, supra, the inmate's need for assistance to gain access to the courts was found to outweigh a legitimate state interest because no effective alternative means of access were available. When the state has no legitimate interest in suppressing the inmates' chosen method of expression or communication, however, the existence of alternative means of communication is irrelevant. To allow the state to choose the means by which inmates may pursue lawful and constitutionally protected activities when the inmates' choice of methods does not conflict with any legitimate state interest is to allow the most arbitrary and intrusive censorship.

Further, there are no adequate alternative methods by which appellee and its members can hope to accomplish their goals.

Individual efforts at litigating, stimulating legislative action, and otherwise acting to ameliorate prison conditions are no substitute for the effectiveness of such activities when undertaken by a group. As this Court stated in N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958), "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhenced by group associations, as the Court has more than once recognized by

remarking upon the close nexus between the freedom of speech and assembly." There can be no adequate alternative means to the effectiveness of advocacy by group associations.

Appellants point to the inmate grievance procedure as a constitutionally acceptable alternative to the Union. The inmate grievance procedure has been threatened by budgetary cut backs, and appellants themselves have attempted to abolish the inmate grievance procedure altogether. (A. 181-184). This procedure clearly does not provide an adequate alternative forum, for many of the problems that the appellee Union seeks to address do not concern the internal administration of prisons to which the grievance procedure is limited.[11] For example, the Union seeks to deal with problems ex-offenders confront in re-entering society by promoting public awareness of these problems, by seeking to establish halfway houses and ex-offender employment services, and by other feasible means. (A. 171-172). The prison administration has no power to

[11] The Executive Director of the inmate grievance commission testified that he did not consider the Union to pose any threat to the jurisdiction of his agency. (A. 180).

effect these reforms.

One of the Union's primary purposes is to sponsor and secure attorneys for prisoner rights and prison conditions litigation. (Articles Incorporation 2-3; A. 170-171). Cooperative arrangements for vindicating legal rights through court action is a manifestation of the right of association that has been accorded a high level of protection in this Court. N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Brotherhood of Railway Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). The right of access to the courts is one right that a prisoner clearly retains; this right is absolutely essential because all other constitutional interests of a prisoner depend upon his ability to get his case to court. Ex parte Hull, 312 U.S. 546 (1941); Johnson v. Avery, 393 U.S. 483 (1969). In the latter case this Court expressly approved the collective solution to gaining practical access to the courts devised by the jailhouse lawyer and his inmate client. The promise of better access to the courts, through Union lawyers, their paraprofessionals and law libraries and other advantages, is something for which appellants have not provided, and are unwilling to provide, any acceptable

alternative. See Ross v. Moffitt, 417 U.S. 600 (1974) (no appointed counsel beyond direct appeal to intermediate appellate court in North Carolina); Smith v. Bounds, pending decision of this court as no. 75-915 (state's position is that no law books whatsoever should be made available to prisoners in North Carolina).

In Pell, supra, at 828 n. 6, this Court suggested that the right to petition the government for redress of grievances encompasses the right to petition all three branches of the government. Collectively petitioning the public, the courts, the legislature and the executive branch is one of the very few potentially effective means available to inmates who wish to bring about peaceable change in the correctional system.[12] Individual inmates cannot reasonably expect to

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12 As the Second Circuit noted in Sostre v. McGinnis, 442 F.2d 178, 200 (2nd Cir. 1971), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978 (1972), "[t]he generous scope of discretion accorded prison authorities also heightens the importance of permitting free and uninhibited access by prisoners to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers."

influence the legislature by writing letters proposing new programs. Since convicted felons are deprived of the right to vote in North Carolina, Fincher v. Scott, 352 F.Supp. 117 (M.D.N.C. 1972), see Ramirez v. Richardson, 418 U.S. 24 (1974), inmates cannot even hope to influence the legislative or executive branch by use of the ballot. Prisoners must, of necessity, be concerned with problems of prison reform and society's treatment of ex-offenders. It is no less imperative that the rest of society understand and attempt to address the problems of offenders and ex-offenders. See Burger, Our Options Are Limited, 18 Vill. L. Rev. 165 (1972). As noted above, this Court has consistently held that inmates retain all First Amendment rights not inconsistent with their status or with legitimate penological goals. Pell, supra, at 822; Price v. Johnston, supra, at 285. The choice of means of expressing beliefs, seeking redress of grievances, and discussing and pursuing common goals, as freedoms springing from the very core of the First Amendment, must be among those rights retained.

II. THE BANNING OF UNION MEMBERSHIP SOLICITATION, MEETINGS AND BULK NEWSLETTER DISTRIBUTION VIOLATES FOURTEENTH AMENDMENT EQUAL PROTECTION PRINCIPLES.

A. The Prisoners' Labor Union Members are Entitled to be Treated Equally with Members of Other Inmate Organizations.

Because the freedom of association derived from the First Amendment is involved here, the members of the North Carolina Prisoners' Labor Union are entitled to be placed on an equal footing with members of other inmate organizations. "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than whims or personal opinions of a local governing body." Niemotko v. Maryland, 340 U.S. 268, 272 (1971).

This Court has condemned discriminatory treatment of prisoners, at least where fundamental rights (or suspect classifications) are in issue, in a variety of contexts. Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964; O'Brien v. Skinner, 414 U.S. 524 (1974); Lee v. Washington, 390 U.S. 333 (1968). Certainly then lawful incarceration does not cause a forfeiture of the prisoner's entitlement to equal protection of the laws with respect to fundamental rights under the Fourteenth Amendment. Cf., Price v. Johnston, 334 U.S. 266, 285 (1948).

The Junior Chamber of Commerce and Alcoholics Anonymous are allowed to operate within the prisons by the North Carolina Department of Correction.[13] These organizations are permitted to solicit other prisoners to join, to meet in space provided by the Department, to publish newsletters in prison facilities and distribute them in bulk to inmates, to have outside organizers and leaders who visit them, and to be involved in a variety of other activities. None of these opportunities were afforded the North Carolina Prisoners' Labor Union. (A. 125-126, 174-175).

Appellants give their reason for the discriminatory treatment to be that the Junior Chamber of Commerce and Alcoholics Anonymous have been found to demonstrate legitimate rehabilitative purposes and to fill the needs of the inmates, that the Jaycees are able to attain productive associations with stable community representatives and to accomplish some of its projects in the community, and that Alcoholics Anonymous provides therapeutic support for those who have encountered the deteriorative effects of alcoholism. (A. 126-127). Yet the appellee Union has goals that are equally positive: procuring

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[13] Other groups recognized and allowed to operate by the Department of Correction include Women's Club, Yokefellows, Boy Scouts, Weightwatchers and China Art Club.

meaningful rehabilitation programs, defending human and civil rights of prisoners, arranging for community based support groups to further the cause of prisoner reform, to establish halfway houses, to assist prisoners finding homes and jobs upon release, and advancement of prisoners' economic, political, social and cultural interests. (Articles of Incorporation 2-3; A. 170-171). Moreover, the evidence is uncontradicted that the Union had helped to bring about a measure of racial unity at Central Prison, that democratic processes of the organization had had a positive effect on the members' individual responsibility, and that the Union had helped to build self-reliance among the inmates by working toward positive means of overcoming the common problems of the confined. (A. 172-173, 166-167).

Unsupported by the evidence, appellants harbor suspicions that the activities of the Union will be detrimental to the institutional rehabilitation programs and will pose a threat to the security and discipline of the correctional system. Appellants seek to outlaw the Union on the basis of their own unfounded fears, and not on the basis of the declared purposes of the Union or any actions that to date have been attributed to it. The discriminatory treatment of the Union, when measured against the privileges granted to other inmate organizations

with similar goals and activities, is the denial of equal protection of the laws in its baldest form. The Court in Greer v. Spock, 424 U.S. 828, 838 (1976), decided that the admission of a visiting preacher, an outside lecturer on drug abuse, and a rock music group did not make it mandatory that a military base commander allow political speakers to use his facilities, but the Court made it clear that the base commander was not free to admit some political candidates and exclude others based on their "supposed political views" without violating equal protection principles.

Even if the appellants were right, and there could be discerned from the record some substantial qualitative difference between the goals of the prisoners' union and the goals of the organizations which appellants allow to be active, the Union on the one hand and the other inmate groups on the other hand have so many characteristics in common, that they cannot be subjected to disparate treatment without a denial of equal protection of the laws. The Union and the other groups alike are composed primarily of inmates, have outside supporters, desire to improve the conditions of their members, seek for support and recognition by members of the general public, and plan various service projects. The correctional administration is bound by the Fourteenth Amendment not to treat these similar organizations differently, simply

because the Union and its members say things or stand for things that are unwelcome to their keepers. Procunier v. Martinez, 416 U.S. 396, 413 (1974).

The fundamental constitutional right of association is claimed by appellee and its members. The opportunities -- solicitation of membership, holding of meetings, convenient distribution of its publications -- made available by appellants voluntarily to similarly situated groups, and granted to appellee by order of the district court, all are reasonable and necessary toward the advancement of associational interests. To justify the deprivation of these opportunities to appellee, the burden falls upon the State to show that they are overcome by a very substantial state interest in prison security, discipline, or rehabilitation. Cruz v. Beto, supra; Cooper v. Pate, supra; Procunier v. Martinez, supra. As is fully demonstrated in Part I. A. of this argument, the state has utterly failed to carry this burden.[14]

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[14] In conformity with the District Court's opinion, the Department of Correction adopted a regulation on May 5, 1976, which provides for non-discriminatory treatment of all inmate groups, and properly takes into account the legitimate state interests involved. Appellee knows of no impairment to security, discipline and rehabilitative programs within the Department

The District Court correctly applied these principles. Although it was found that no danger to security and order could presently be expected from Union

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of Correction, that in any way can be attributed to the enforcement of this new regulation. Given appellants' penchant for going outside the record of this case, Appellants' Brief, 29, n. 16, it must be assumed that any negative results attributable to the new regulations would have been brought to the Court's attention. The regulation provides:

> .0201 GENERAL
> The purpose of this section is to regulate the activities of inmate groups not sponsored by the Department of Correction and organized within units of the division of prisons. Organizations will be allowed to perform rehabilitative functions but organized inmate discussions may be limited where security considerations may be undermined. Programs directly sponsored by the division of prisons and regularly scheduled religious services are not regulated by this section.
>
> .0202 TIME, PLACE
> (a) Organizations may meet no more than two times per week actively. The exact number of daily meetings may be limited where adequate facilities are unavailale.

meetings and bulk mailings, the Court made it clear that the prison authorities retained the prerogative to restrict or stop the activities if they threatened

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(b) Each meeting shall be directly supervised by line staff members whenever possible. The officer in charge shall decide whether sufficient staff is present to allow any particular meeting. If not, the meeting may be postponed until adequate supervision becomes available.
(c) The number of inmates permitted to attend meetings of inmate organizations will be limited as follows:
(1) Maximum and close custody institutions - no more than 25 inmates.
(2) Medium and minimum custody units - no more than 25 inmates.
All inmates are permitted to attend outside sponsored group activities except those assigned to administrative, disciplinary, or indefinite non-punitive segregation; death row or safekeeping, new admissions.
(d) Meeting length subject to reasonable limits.

.0203 PROGRAM SPONSORS
All program sponsors are subject to departmental rules and regulations regarding searches of visitors and the time, place and manner of visitation. (2F.0100 and 2D .0200).
The number of sponsors may be limited as specifically provided in 2D.0204(b). Program sponsors may be

unrest, disruption, breaches of security, or were otherwise harmful. Jurisdictional Statement, 29-30. Thus, the court below gave the appellants all the latitude

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excluded from prison facilities for any of the reasons stated in 2D.0201 (c).

.0204 STATEMENT OF PURPOSE, BYLAWS
All outside sponsored groups must have an approved statement of purpose and bylaws on file with the Chief of Program Services. This statement must contain the following:
(1) Purpose and objective of organization;
(2) Methods required to achieve purpose (operation statement);
(3) Requirements for membership;
(4) Dues (if any) and recordkeeping procedures. This should include disbursements and statements of quarterly balances; (fiscal procedures shall be approved by the Comptroller).
(5) Statement of affiliations of national or regional organizations if applicable.
(6) Method of electing officers.

in governing their institutions which they reasonably need, and at the same time upheld the rights of the Union and its members to equal protection of the laws.

B. The Equal Treatment Mandated by the District Court was an Appropriate Prophylactic Measure to Prevent Rampant Violation of the Prisoners' Correspondence, Reading, and Judicial Access Rights.

In addition to seeking protection for associational rights, the Union asked for injunctive relief in this case against unconstitutional withholding of correspondence, interdiction of publications, and interference with paralegals.

Robbie Purner, a non-prisoner and supporter of the Union, attempted to correspond with several inmates. Her letters were intercepted by correctional personnel and mailed back to her without explanation. (A. 144-146). By Department of Correction regulations, inmates are entitled to receive incoming mail, as long as it does not contain contraband, material that poses a clear and present danger to security or material that cannot lawfully be mailed. (A. 135-136). The regulations presently before the Court ban solicitation of members only by fellow inmates, not by non-prisoners. Thus, appellants violated their own regulations by interfering with the mail from Ms. Purner to her inmate correspondents. This

conduct was also in violation of the clear command of Procunier v. Martinez, 416 U.S. 396, 417 (1974), requiring "that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence."

The Union publishes a bi-monthly newsletter. (A. 171). Correctional officers intercepted the Union newsletters, and either returned them to the senders or disposed of them without following any procedures. (A. 143, 151-153, 154). A Department of Correction regulation authorizes inmates to receive publications through the mail from publishers, allows inmates to exchange newspapers and other publications, permits publications to be rejected only if they pose a clear and present danger to prison security or are obscene, and establishes procedures for rejections including notice, opportunity to be heard, and impartial decision making. (A. 138-140). The decisions are legion, both before and after Prounier v. Martinez, which hold that publications cannot be withheld from prisoners without complying with the procedural due process requirements of (1) notice, (2) some opportunity to object, either personally or in writing, and (3) a decision by someone who can be expected to act fairly. Sostre v. Otis,

330 F.Supp. 941 (S.D.N.Y. 1971); Hopkins v. Rollins, ___ F.2d ___ (4th Cir. No. 76-1564, Jan. 28, 1977); Aikens v. Lash, 390 F.Supp. 663, 672 (N.D. Ind. 1975); Battle v. Anderson, 376 F.Supp. 402, 425 (E.D.Okla. 1974); Gray v. Creamer, 376 F.Supp. 675, 682-683 (W.D.Pa. 1974); McCleary v. Kelly, 376 F.Supp. 1186, 1192 (M.D.Pa. 1974); Laaman v. Hancock, 351 F.Supp. 1265, 1268 (D.N.H. 1972). The summary interdiction of the Union's newsletters was in clear violation of appellants' own standing regulation and was a denial of procedural due process of law.

Deborah Mailman, one of the appellee's attorneys, employed two paralegals, Chuck Eppinette and Robbie Purner, to visit prisoners in connection with legal representation of the Union, as well as in connection with work being done by her as a private attorney for prisoners and as a cooperating attorney of the North Carolina Civil Liberties Union. (A. 157-163, 164). Appellants barred Ms. Mailman's paralegals from the prisons, based on suspicions that they were acting as Union organizers instead of legal assistants. (A. 123-124, 130-133). In Procunier v. Martinez, supra, the Court invalidated a regulation which banned paralegals who were not either lawyers themselves or licensed private investigators, from interviewing prisoners. Accordingly, appellants' conduct in this regard was in clear violation of the established right of access of prisoners to the courts.

Instead of dealing with these numerous collateral violations of prisoners' rights specifically and in great detail, [15] the Court invoked the acceptable expedient of simply requiring the appellants to treat the Union the same as other organizations. Once the Union can no longer be singled out and treated in a discriminatory fashion, all of the other constitutional problems tend to disappear. Members of the Jaycees and Alcoholics Anonymous were not being heard to complain that their mail was being withheld, that their newsletters were being sent back, or that their lawyers' paralegals were being denied access to them. Once the Union is regarded as legitimate and the discrimination against its members ceases, the deprivation of rights relating to correspondence, publications, and access to the courts likewise are resolved. In this way the District Court's order had a prophylactic effect, and should be upheld in part because of the collateral constitutional deprivations that it cures.

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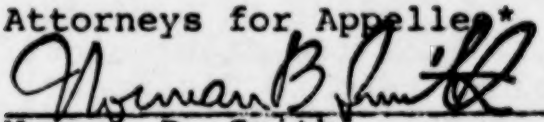
[15] The District Court did briefly discuss the exclusion of paralegals, concluding that a paralegal with a genuine need to interview a prisoner with respect to pending litigation could not be excluded, even if during the course of the interview there is a solicitation to join or other conversation concerning the Union. Jurisdictional statement 30-32.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

Attorneys for Appellee*



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